IN THE

Supreme Court of the United States

October Term, 1976

No. 76-307

JOHN J. WOLERY,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, John J. Wolery, an Attorney at Law, a practicing criminal defense attorney for eighteen years, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Ohio entered on June 2, 1976, which judgment affirmed his conviction of receiving and concealing stolen property by the Franklin County, Ohio, Court of Common Pleas.

OPINION BELOW

The opinion of the Supreme Court of the State of Ohio reported as *State v. Wolery*, 46 Ohio St. 2d 319 (1976) is attached at Exhibit A.

JURISDICTION

The judgment of the Supreme Court of the State of Ohio was entered on June 2, 1976, affirming petitioner's conviction dated November 16, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). Petitioner believes that a conviction, as his, based upon the uncorroborated testimony of three self-confessed career criminals, all clients of the petitioner, after the Prosecutor deliberately withheld the Miranda Warning, as announced by this Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), as a "device" to establish immunity before said criminals divulged any information implicating the petitioner as their accomplice and co-conspirator is violative of the Due Process and Equal Protection clause of the United States Constitution and that such procedure denied petitioner a fair trial. There is a conflict among the various states whether a criminal defendant can be convicted upon the uncorroborated testimony of self-confessed criminals who have been given complete immunity from prosecution in return for their testimony. Further this Court has jurisdiction to review conduct of Prosecutors and Police Officers, who manipulate decisions of this Court in a manner which offends "fundamental justice".

QUESTIONS PRESENTED

1. Is it violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and the Federal requirement of a Fair Trial for a criminal defendant to be convicted solely upon the uncorroborated testimony of a self-confessed criminal who claims to have been an accomplice of the defendant when that witness is rewarded with immunity for all crimes to which he testifies in return for testimony against said criminal defendant?

2. Is it permissible within the Constitutional requirement of Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution in the guarantee of a Fair Trial for a State Prosecutor and Police to deliberately conspire with and to intentionally fail to give a criminal suspect the Miranda Warning and otherwise withhold the mandate of the United States Supreme Court as announced in *Miranda v. Arizona, supra,* at the outset of questioning upon the premise that should said suspect later confess certain crimes and implicate their attorney as an accomplice in the criminal conduct which they are about to reveal they will thus be protected from individual prosecution or does such conduct otherwise offend fundamental justice and so taint the trial as to deny to the defendant so convicted with said testimony the constitutional requirement of a fair trial?

3. In the novel situation of a criminal defense attorney's trial where the only evidence is the testimony of a self-confessed career criminal—who has been represented by that same attorney for nearly all

the fifteen years that he has been an attorney—who with complete immunity confesses to numerous crimes and implicates his attorney as an accomplice to some of those same crimes is that so shockingly wrong as to raise a matter of evidence to the level of a denial of substantive Due Process and is this conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution Of The United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution Of The United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Constitution Of The United States, Amendment XIV, Section I:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

> citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, John J. Wolery, a criminal defense attorney before state and federal courts for over fifteen years at the time—having been admitted to the Ohio Bar on April 23, 1958—was on August 16, 1973, indicted by the Franklin County, Ohio, Grand Jury on eight counts of receiving and concealing stolen property in violation of Section 2907.30, Ohio Revised Code, under five separate cases.

Petitioner entered a plea of not guilty to all counts and was tried before a jury in November of 1973. In a trial of ten days, the state presented seven unfortunate victims of as many burglaries of assorted items from antique dishes to airplane radios and thereafter presented three individuals who offered testimony, personally admitting to having committed these crimes, seeking to individually link the Petitioner to different counts of the eight counts under the indictment.

Three self-confessed career criminals testified of being in various stages of indictment, arrest and awaiting sentencing for numerous state and federal crimes when they, and often their wives, were approached by officers of the Columbus, Ohio, Police Department and by lawyers with the Franklin County, Ohio, Prosecutor's Office offering a deal by which in exchange for testimony linking their attorney with their various burglaries they would be given absolute immunity—bordering on full amnesty—for all crimes "except

murder and perjury" to which they confessed while linking this attorney to the receiving and benefiting from the goods from some of those same crimes which they committed. The State's trial prosecutor, by his questions, established that it was the police and the prosecutors who did all the talking and made all the contacts and overtures seeking to elicit testimony implicating this criminal defense attorney.

The State of Ohio called Lester Compton who testified—as is revealed in the record of the trial court below*—that while awaiting sentencing upon a Federal Conviction in New York, he was permitted to return to Ohio for the funeral of a brother at which time he was arrested during the commission of a burglary. That State's witness testified:

"DIRECT EXAMINATION OF COMPTON BY PROSECUTOR:

PROSECUTOR: Q. While it — was it while you were back in Columbus that you were caught in this burglary that we — you were charged with here?

COMPTON: A. Yes.

PROSECUTOR: Q. And since the date of your capture at the burglary scene, you've been in the Franklin County Jail ever since?

* The official transcript of the trial below is in the form of audio-video tape coering the ten day trial. This form of transcript was found to be not acceptable by the Franklin County, Ohio, Court of Appeals who ordered a written transcript prepared. In this petition all references to the trial record are from this written transcript captioned Audio Cassette Transcript Of Video Record, Part One and Part Two, and will herein be captioned Trial Transcript.

COMPTON: A. Yes, sir.

PROSECUTOR: Q. From time to time while you were in the County Jail, Mr. Compton, did any detectives of the Columbus Police Department come to talk to you?

COMPTON: A. Many times.

PROSECUTOR: Q. And on the occasions when they would come and talk to you in the County Jail, did you talk with them?

COMPTON: A. I more or less listened and talked less.

PROSECUTOR: Q. You did the listening and they did the talking? I take it you didn't answer much in the way of questions for them?

COMPTON: A. No."

Trial Transcript, P. 377-378

The procedure followed by the State's Prosecutor and Police in building the case against Attorney Wolery, was further testified to by Witness Johnston upon cross-examination by Petitioner's trial counsel:

"CROSS-EXAMINATION OF JOHNSTON BY DEFENSE COUNSEL:

COUNSEL: Q. Who were you questioned by of the Columbus Police Department in April, 1973?

JOHNSTON: A. Quite a few police officers.

COUNSEL: Q. Quite a few. How many times?

JOHNSTON: A. Ah — Over a period of — ah — maybe a week, probably — why, every day of that week. Now, as to how many different peoples, I don't know. Maybe five a day — six a day.

COUNSEL: Q. Were you tired?

JOHNSTON: A. No.

COUNSEL: Q. Did you feel under any pressure?

JOHNSTON: A. Ah — No more than normal.

COUNSEL: Q. No more than normal?

JOHNSTON: A. Yah.

COUNSEL: Q. Are you giving your testimony in this case, Mr. Johnston, because you got immunity?

JOHNSTON: A. Ah — I was assured that I was going to go to the Penitentiary for a long time unless I told everything that I know. Well, everything that I've done and I have not testified to anything other than what I, myself, have done.

COUNSEL: Q. Were you trapped into this by Stroebel?

JOHNSTON: A. No. I took what was offered.

COUNSEL: Q. Well, that was the best deal, you could make, wasn't it?

JOHNSTON: A. I never tried for anymore.

COUNSEL: Q. Now, I'm going to refer — page 44 — again to the deposition taken June 11, 1973, by Larry Kimble and in order to refresh your recollection, I ask you if you recall these questions; two of them and these two answers? Question: 'Then in turn you accepted immunity in this case if you would testify against other people?' Answer: 'I was — you know like guaranteed if I didn't I would probably spend the rest of my life in prison.' Question: 'So that is the reason you're testifying in this case?' Answer: 'Yes, since I was trapped into it, I'm making the best deal I can.'
You were asked those questions and gave those answers?

JOHNSTON: A. Un Hm [Yes]"

Trial Transcript, P. 499-500

The testimony offered established that all three witnesses—Hall Courtney "Duke" Stroebel, Donald K. Johnston and Lester L. Compton—had been petty burglars for over fifteen years each—all had careers reaching back to juvenile offenses. All three testified that for a great portion of this time they had been represented by the Petitioner—he had been and was,

at the time their testimony was solicited, their criminal defense attorney!

The State's Prosecutor established by testimony of the elaborate and original scheme by which this Office did "safeguard" and otherwise "guarantee" these three criminals, whose testimony he was soliciting, absolute immunity from future prosecution for all crimes testified to at trial—by not complying with and otherwise ignoring the mandate of this Court in *Miranda* and *Escabedo v. Illinois*, 378 U.S. 478 (1964). Before hearing what evidence these career criminals could offer the Prosecutor "told them" that should they happen to implicate their attorney such testimony in court by them against their criminal defense attorney would be rewarded with what was to amount to full amnesty for all crimes—which the record of the trial established included the attempted murder of a witness in another criminal case in which Stroebel and Johnston were on trial!

The scheme of establishing immunity by not giving the Miranda Warning was testified to by Witness Stroebel upon examination by the Prosecutor:

"PROSECUTOR: Q. Did you talk with me [the Prosecutor]?

STROEBEL: A. Yes, I did.

PROSECUTOR: Q. Was a discussion of immunity held at that time?

STROEBEL: A. Yes, it was.

PROSECUTOR: Q. What were you advised?

STROEBEL: A. I was advised that Ohio didn't have a — actually a technical immunity law for a case like this, but that you

would give me immunity by not giving me my rights.

PROSECUTOR: Q. Subsequent to that, sir, did you begin conversations with people in the Prosecutor's Office and the police about what you knew about crime in Columbus or Central Ohio?

STROEBEL: A. Yes, I did.

PROSECUTOR: Q. Do you recall meeting Mike Miller of the Prosecutor's Office?

STROEBEL: A. Yes, I — ah —. Actually after the arrangements were made with you, he was to be in charge of — I guess you would call it the investigation from the Prosecutor's Office.

PROSECUTOR: Q. Did you have a lot of conversations with him?

STROEBEL: A. Yes, sometimes as high as 12 and 14 hours a day."

Trial Transcript, P. 241

At the time this criminal trial was being organized there was no provision for or authority for a Judge, let alone a Prosecutor or Police Officer, to extend a "grant of immunity" in return for testimony. An "ingenious" Ohio Prosecutor developed the scheme by which these subjects would not "be given their rights" —the Miranda Warning would not be read—prior to any confession or information given, therefore absolutely "protecting" these criminals from ever being

placed in jeopardy. Further promises and deals were made representing how this testimony would be rewarded with appearances by representatives of the Franklin County, Ohio Prosecutor's Office before courts about to sentence these criminals on other criminal convictions who would there plead for "mercy" in recognition of that criminal's "service to Ohio".

The only evidence offered by the State was the testimony of these three self-confessed burglars who alleged that their attorney, the Petitioner, was one of their accomplices. The testimony of Witness Compton established that the "deal" with the Prosecutor included a promise that he would not have to violate the "code of the underworld" in that he would not have to implicate any accomplices other than his attorney:

"CROSS EXAMINATION OF COMPTON BY DEFENSE COUNSEL:

COUNSEL: Q. Now, you say you made some kind of an arrangement [in addition to] immunity, but in that arrangement you made, did you not exclude William Step, Richard Bostic, Thomas Wilkinson, R. D. Hopkins, and Chuck Stanley from any testimony that you might give against anyone?

COMPTON: A. I think you got a bad list.

COUNSEL: Q. All right. Would you give me a proper list?

COMPTON: A. I think I excluded Charles Crowder instead of Chuck Stanley.

COUNSEL: Q. All right. Charles Crowder?

COMPTON: A. To the best of my recollection, I — I never read it — it [written agreement with

the Prosecutor] over real carefully but there was a number of people that I did fear that I ex — stated I would not testify against under any circumstances for fear that they might take revenge on my family later.

COUNSEL: Q. And Charles Crowder was one of these?

COMPTON: A. Yes, I think he was.

COUNSEL: Q. And yet he's the man you threatened, isn't he?

COMPTON: A. Again, I cannot answer the question.

COUNSEL: Q. Because you don't know.

COMPTON: A. Because if it was any one of the five, I wouldn't answer the question."

Trial Transcript, P. 420-421

The State of Ohio rested its case upon the uncorroborated testimony of in effect, one witness giving testimony to each count—only to the count of receiving a stolen airplane radio did two witnesses, Stroebel and Johnston, testify as to the other counts only one witness offered testimony seeking to establish the Petitioner's —Attorney's—involvement as an accomplice. The only evidence was from self-confessed criminals and alleged accomplices who testified that they were rewarded with amnesty from crimes which if for which they were convicted would in all reality mean spending the remainder of their natural life in prison in light of the seriousness of the charges—from breaking and entering of an inhabited dwelling in the night session to attempted murder by bombing—and their extensive criminal records.

Trial counsel for the Petitioner moved the Court to dismiss all the charges upon the failure of the state to present evidence sufficient to support the charges upon this uncorroborated testimony further upon the conduct of the Prosecutor in deliberately withholding the Miranda Warning. The trial court denied this motion on seven counts and dismissed one count upon the failure of the state to establish ownership of one of the airplane radios.

The Petitioner took the stand in his own behalf testifying that he had been criminal defense counsel to all three of the state's self-confessed criminal witnesses and that he had so represented them before state and federal tribunals. This attorney emphatically denied any criminal behavior or misdeeds and testified that he had at all times only vigorously defended them seeking justice as their trial advocate. The defense called three judges of the Franklin County Court of Common Pleas who testified as to the outstanding reputation and standing of this attorney as a most powerful and successful criminal defense counsel. Upon the conclusion of the trial before the matter was presented to the jury, defense counsel moved the court for a judgment of acquittal. This motion was denied. The jury was then charged as to seven counts of the eight count indictment.

The jury returned a verdict of "not-guilty" to three counts and "guilty" to four counts of the eight counts originally charged. A timely appeal was taken to the Franklin County, Ohio, Court of Appeals charging nine assignments of error. In a decision returned on July 16, 1974, the Court of Appeals affirmed the conviction. A Motion To Reconsider was timely filed and on September 10, 1974, the Court of Appeals issued a decision dismissing this Motion.

The decision of the Franklin County, Ohio, Court of Appeals was timely appealed to the Ohio Supreme Court which returned a decision on June 2, 1976, affirming the conviction in an opinion reported as *State v. Wolery*, 46 Ohio St. 2d 316 (1976).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW SANCTIONS AND GIVES LICENSE TO PROSECUTORS AND POLICE OFFICERS TO PATENTLY DISREGARD A MANDATE OF THE UNITED STATES SUPREME COURT AND TO MANIPULATE A CONSTITUTIONAL RIGHT INTO A VEHICLE BY WHICH THEY SERIOUSLY JEOPARDIZE THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The unabashed perversion of the Miranda Warning —which sprang out of this Court's decision in *Miranda v. Arizona, supra,* — by the Franklin County, Ohio, Prosecutor and the Columbus, Ohio, Police Officers presents a serious legal problem in the administration of justice and presents a most substantial Due Process question.

Every facet of the Court's decision in *Miranda* has been distorted and twisted into a tool of oppression and coercion. The *Miranda* decision which is an implementation of *Escabedo v. Illinois, supra,* and which served as an expansion and clarification thereof has been used by the Ohio Prosecutor and Police as a vehicle to destroy all that those two decisions were designed to clarify and guarantee in the criminal justice system.

The prosecutor and police officers herein took into custody criminal suspects who they subjected to one-sided conditioning and indoctrination—a reverse type of interrogation—and threatened these subjects with numerous prosecutions with promises of long prison sentences which could be exchanged for freedom conditioned upon the acceptance of a programmed testi-

mony implicating their criminal defense counsel as an accomplice in their burglaries. These criminal suspects were deprived of their freedom by the establishment of exceedingly high bail or were otherwise "trapped" as Witness Johnston testified, *see,* Trial Transcript, P. 500, into giving involuntary confessions which however would not be used against them but against their attorney. They were guaranteed immunity from prosecution by the deliberate and calculated "failure" to warn. The Supreme Court of Ohio in their review of this practice in an opinion by Justice Paul W. Brown, said of this:

> "[T]he Franklin County prosecutor made promises of immunity to witnesses, Stroebel and Johnston, and safeguarded these promises by deliberately failing to read . . . the Miranda Warnings . . . [I]t does not follow that appellant [Attorney Wolery] was thereby prejudiced, or that the testimony so obtained was inadmissible."
>
> *State v. Wolery, supra,* 319.

The Ohio Supreme Court gave its stamp of approval to this perversion of *Miranda* by holding that the petitioner was not prejudiced by such manipulation in order to affirm this attorney's conviction however, did attach a most curious footnote:

> "Though so holding, the court wishes to indicate its disapproval of the prosecutor's decision to fail to advise witnesses, Stroebel and Johnston of their constitutional rights under *Miranda v. Arizona,* (1966) 384 U.S. 436, for the purpose of granting immunity to, and obtaining the testimony of, those witnesses. The members of the court do not condone this conduct, and prosecutors and their staffs should hereafter avoid such unseemly behavior."
>
> *State, v. Wolery, supra,* Footnote No. 3, 323.

The relegation of such a shocking example of police-state tactics to a footnote is a tragedy if not a mockery of the pronouncement of this Court in *Miranda*. The state's police and prosecutors squeezed their witnesses between express and implied threats of life in prison—they were highly vulnerable and they seized the enormous personal benefit to them which was offered—the sacrifice of their attorney for freedom. A most enticing offer based upon the prostituted use of this Court's decision in *Miranda* and the career of a criminal defense attorney!

In *Rochin v. California*, 342 U.S. 165, 172-173 (1952), Justice Frankfurter writing for the Court said:

> "It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforcing the constitutional principle that the States may not base convictions upon confessions, however, much verified, obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that states in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a 'sense of justice'."

What has occurred here violates and offends the Due Process and Equal Protection Clauses of the Four-

teenth Amendment for as the court in *U.S. v. Toscanino*, 500 F2d, 267, 272 (1974) said:

> "[N]o longer is [Due Process] limited to the guarantee of a 'fair' procedure at trial. In an effect to deter police misconduct, the term has been extended to bar the government from realizing the fruit of its own deliberate and unnecessary lawlessness in bringing accused to trial."

2. THE DECISION BELOW HOLDING THAT A CONVICTION BASED SOLELY UPON THE UNCORROBORATED TESTIMONY OF A SELF-CONFESSED ACCOMPLICE WHO TESTIFIES WITH IMMUNITY AND PROMISES OF REWARDS DOES NOT OFFEND JUSTICE OR DENY THE DEFENDANT OF A FAIR TRIAL CONFLICTS WITH THE REQUIREMENTS OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW. THERE IS A CONFLICT AMONG THE STATES AS TO THE ANSWER TO THIS QUESTION.

The decision below is not a correct analysis of the law of the criminal justice system as it exists today and is based upon an incomplete review and appreciation for the requirements of the United States Constitution.

The Supreme Court of Ohio held that upon a review of the weight of or sufficiency of the evidence necessary to sustain a criminal conviction based upon the uncorroborated testimony of an accomplice relied upon the dicta of this Court in *Caminetti v. United States*, 242 U.S. 470 (1917) and held that pronouncement to be a "federal rule". In that decision this Court stated:

> "[T]his court refused to reverse a judgment for failure to give an instruction of this general character, while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence."
>
> *Caminetti v. United States, supra*, 495.

The Ohio Supreme Court ignored the suggestion in that decision when the Court indicating that ". . . it

[is] the better practice for courts . . . to require corroborating testimony before giving credence to such evidence". The Court went on to say:

> "While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them."
>
> *Caminetti v. United States, supra*, 495.

The Court is urged that it is time to make the pronouncement in *Caminetti* "to require corroborating evidence" an "absolute law"! Ohio misinterpreted the applicable message of *Caminetti* as have some twenty-nine other states. There is a conflict interpreting this 1917 decision for in some seventeen states corroboration is required by statute, *see, State v. Wolery, supra*, Footnote No. 8, 330. In two states—Maryland and Tennessee—corroboration is required by judicial decision:

The Court of Appeals of Maryland said in *Watson v. State*, 208 Md, 210, 217, 117 A.2d 549, 552 (1955):

> "It is a firmly established rule in this State that a person accused of crime may not be convicted on the uncorroborated testimony of an accomplice. [citations omitted] . . . The reason for the rule requiring the testimony of an accomplice to be corroborated is that it is the testimony of a person admittedly contaminated with guilt, who admits his participation in the crime for which he particularly blames the defendant, and it should be regarded with great suspicion and caution, because otherwise the life or liberty of an innocent person might be taken away by a witness who makes the accusation either to gratify his malice or to shield himself from punishment, or in the hope of receiving clemency by turning State's evidence. [citations omitted] . . ."

The Supreme Court of Tennessee said in *State v. Fowler*, 213 Tenn. 239, 245-246, 373 S.W. 2d 460, 463 (1963):

> "Under the common law, the testimony of an accomplice, if it satisfies the jury beyond a reasonable doubt of the guilt of the defendant, may be sufficient to warrant a conviction although it is uncorroborated. The rule is this State, however, requires corroboration, and there should be some fact testified to entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but that the defendant is implicated in it, and the corroboration must consist of some fact that affects the identity of the party accused. [citations omitted] . . . ."

The Court is urged to grant this writ of certiorari and to permit argument that it is time—on the 60th Anniversary of *Caminetti*—to establish that it is violative of Due Process and Equal Protection for a criminal defendant to be convicted upon the uncorroborated testimony of an accomplice.

The Petitioner was convicted upon the uncorroborated testimony of self-confessed criminals who were rewarded with complete immunity—as well as financial inducement—for this testimony implicating their criminal defense attorney as an accomplice to their burglaries. The jury returned its verdict in *State v. Wolery*, on November 16, 1973. On January 1, 1974, Section 2923.03, *Complicity*, Ohio Revised Code became law—this statute states at Section 2923.03(D): "No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence". It appears that "possibly" the Petitioner could not have been convicted

had his trial been held forty-five days later—however, this statute was in effect on June 2, 1976, when the Ohio Supreme Court decided *State v. Wolery, supra* and stated in Footnote No. 8 that "the Ohio rule" did not require corroboration.

3. THE DECISION BELOW SHOULD BE REVIEWED ON THE BASIS THAT AS A MATTER OF EVIDENCE IT IS SHOCKINGLY WRONG AND RISES TO PRESENT A SUBSTANTIAL DUE PROCESS QUESTION.

The Court should grant certiorari so as to review whether this attorney's criminal conviction was so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. The record of these proceedings goes not only to the sufficiency of the evidence but to whether his conviction rests upon any evidence at all! *See, Thompson v. Louisville*, 362, U.S. 199 (1960) and *Garner v. Louisiana*, 368 U.S. 157 (1961).

The Court's attention is directed to the time in this Nation's jurisprudence when the Petitioner was tried —at the time of the tragic Watergate Affair! Such an influence upon all cannot be ignored—the Franklin County, Ohio, Prosecutor clearly had Watergate in mind when he said in closing argument to the jury before that panel deliberated Attorney Wolery's fate:

> "[I]n this day and age, ladies and gentlemen, there have been people brought before the Bar of Justice whose good character in their particular calling or profession has always been above reproach and who could call upon character witness after character witness and hopefully all of us have friends. But those character witnesses are not involved in the facts, in the individual dealings. They may be shocked to disbelief, but it happens. It happens all the time.
>
> No one has come down. No angel has come down and anointed the foreheads of attorneys and said: 'You are all above reproach and all attorneys are of good character. And all attorneys because they have taken their oath and defend those that are accused will never and can never do anything

> wrong.' There is no such anointing. There is no such protection. On the other hand, no one is here to crucify John Wolery and his entire life. No one has said his entire life is bad. That's not what he's on trial for. He's on trial for specific incidents in that life. As good as that life may be. As productive as it may be. As above reproach as it may be in [fifty] areas. He's here in one area. That's the area you have to decide.
>
> In his association over the years with the thieves, did he fall into a trap of taking an item here, taking an item there and being one of them on a small scale. Thank you, ladies and gentlemen."
>
> Trial Transcript, P. 988-989.

CONCLUSION

The Court is urged in the interest of justice to issue a writ of certiorari to review the judgment and opinion of the Ohio Supreme Court and to permit full and complete argument of this most shocking conduct on behalf of Prosecutors and Police who "play games" with rulings of this Court and to review the procedure whereby a criminal defendant can be convicted upon the uncorroborated testimony of a self-confessed co-conspirator rewarded with immunity from being held accountable for his direct criminal activity. This case presents questions which go to the roots of our concepts of American criminal jurisprudence.

This Petition is filed in the interest of justice—all who come before the bar of the criminal justice system —those who stand accused and those who advocate the cause of the accused—must be assured that they will not have to travel this path laced with treachery. Conduct as engaged in by these Ohio Prosecutors and Police must be condemned else no lawyer will be safe from intimidation and no client will be assured of a fair trial for his counsel will have to compromise his advocacy out of fear for his very survival—to be successful is to invite such attack.

The Petitioner also stands before this Court not only as a fellow attorney but as a simple man—even a most simple man would know that justice has been denied him. The Petitioner also cries out in his final breath as an attorney—this Court can shield him from the final assault which will surely be that after eighteen years as a criminal defense attorney, he will be declared unfit to practice law upon the testimony of three professional criminals who seized a Prosecutor's offer of freedom in return for their faithful attorney's destruction. One who has sought justice for others has had it denied to him by the courts, the prosecutors and

the police of Ohio, who participated in this travesty—this Court will pronounce final judgment as to whether justice will be victorious—treachery unchallenged is treachery encouraged!

The Petitioner is an attorney and he even more so knows that justice has been denied to him—that knowledge is a most grevious hurt, one not easy to describe. The pain is especially sharp for he is trained as one of the protectors of justice and fairness. Such a hurt can destroy and that is the result when justice is denied as it has been to him. Justice is vibrant and alive—having well defined principles and attributes by which a free people grow. Justice gives liberty its meaning and both must be protected from all forms of tyranny else they will wither and die from the strangling vines of treachery and deceit. Justice takes the raw power of the State and molds it into law having a foundation of those defined principles. It is the courts—most especially this Court—who is privileged to seek and define the meaning of justice within the particular context presented. The raw power of the State of Ohio has been wielded in an impermissible and reckless manner and this Court is petitioned to require a full and exhaustive examination of what has occurred within the criminal justice system of Ohio.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ohio Supreme Court.

Respectfully submitted,
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APPENDIX

Exhibit A

IN THE SUPREME COURT OF THE STATE OF OHIO

Case No. 74-1014

THE STATE OF OHIO,

Appellee,

v.

WOLERY,

Appellant.

Decided June 2, 1976

APPEAL from the Court of Appeals for Franklin County.

On August 16, 1973, appellant, Columbus attorney John J. Wolery, was indicted on eight counts of receiving and concealing stolen property, in violation of R. C. 2907.30.[1]

At his trial, in November 1973, three self-confessed criminals testified for the state. Two, Hal Courtney Stroebel and Donald K. Johnston, had been granted immunity from prosecution by the Franklin County prosecutor in exchange for their testimony. A third, Lester R. Compton, had been allowed to plead guilty to a lesser included offense in return for his testimony.

No statute then in effect authorized a grant of immunity to Stroebel and Johnston. For this reason, and

[1] R. C. 2907.30, repealed effective January 1, 1974, provided in part:

"No person shall buy, receive, or conceal anything of value which has been stolen, taken by robbers, embezzled, or obtained by false pretense, knowing it to have been stolen, taken by robbers, embezzled, or obtained by false pretense."

with the express intention of implementing a grant, police officers and prosecutors did not read Stroebel and Johnston the *Miranda* warnings prior to questioning them. To further implement the grant, the prosecutor filed, on June 20, 1973, in the cases of *State v. Stroebel* and *State v. Johnston*, a "motion for immunity" in the Court of Common Pleas of Franklin County. Judge Frederick T. Williams filed an entry in each case, which stated:

"On June 20, 1973, a motion was filed by the plaintiff in this matter requesting that this defendant be granted immunity from prosecution for all crimes that he testified to before the Franklin County Grand Jury in May of 1973. Said immunity request was based on the fact that this defendant would testify in open court concerning his knowledge of said crimes if and when any indictments were returned by a Franklin County Grand Jury based in part or wholly upon said testimony.

"After reviewing the facts and law pertaining to this matter, it is the finding of this court that said motion is well taken and it is hereby sustained. This decision is made in accordance with *State v. Trocodaro* [(1973), 36 Ohio App. 2d 1, motion for leave to appeal denied by this court, October 4, 1973], Franklin County Court of Appeals, Case Number 73-AP-24, decided May 22, 1973."

The purported grants of immunity to Stroebel and Johnston, and the plea bargain with Compton, were disclosed to the jury, and were scrutinized upon direct and cross examination of those witnesses. The trial court instructed the jury to examine accomplice testimony with caution.

Stroebel and Johnston testified to stealing various

items of personal property, including airplane radios, antique dishes and furniture, a mink stole, home entertainment units, television sets, a radio, cash, and a silver coin collection. Compton admitted stealing antique glassware and furniture. Many of these items, according to Stroebel, Johnston, and Compton, were given or sold to appellant, who in each instance, accepted or purchased the property knowing it had been stolen.

Appellant was convicted upon four of eight counts. Specifically, he was found guilty of receiving and concealing antique glassware, a clock, lamp, table, and music box, and two Mark 12(A) airplane radios. One count was dismissed by the trial court. On three of the counts, appellant was found not guilty.

Upon appeal, the Court of Appeals affirmed each conviction.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

Mr. George C. Smith, prosecuting attorney, *Mr. James J. O'Grady* and *Ronald J. O'Brien*, for appellee.

Messrs. Topper, Alloway, Goodman, DeLeone & Duffey and *Mr. John J. Duffey*, for appellant.

PAUL W. BROWN, J.

I.

Appellant attacks the manner in which immunity from prosecution was granted to witnesses Stroebel and Johnston, asserting that such a grant was without statutory authority, and that it did not adequately protect the constitutional rights of Stroebel and Johnston. He seeks, upon this basis, to have the testimony excluded. Appellant argues that the testimony of Stroebel, Johnston and Compton was the product of coercion, and therefore not credible as a matter of law.

He also contends that the Franklin County prosecutor abused his discretion in his selection of those persons to be prosecuted, and, in so doing, violated appellant's right to equal protection of the laws.

At the time of appellant's trial, Ohio had no immunity statute applicable to the crimes committed by Stroebel and Johnston. R. C. 2945.44 permitted courts to grant immunity only in cases involving gambling and liquor violations. To circumvent this implicit stricture against other grants of immunity, the Franklin County prosecutor made promises of immunity to witnesses Stroebel and Johnston, and safeguarded those promises by deliberately failing to read Stroebel and Johnston the *Miranda* warnings, and by securing an entry of immunity from a judge of the Court of Common Pleas. Although this course of conduct was not sanctioned by law, it does not follow that appellant was thereby prejudiced, or that the testimony so obtained was inadmissible.

Whether the purported grant of immunity to witnesses Stroebel and Johnston will effectively shield those individuals from a future prosecution based upon their testimony in appellant's trial [2] is of no concern to the appellant. The Fifth Amendment privilege against self-incrimination is personal to each witness. *Hale v. Henkel* (1906), 201 U.S. 43.

Nor does the fact that the testimony of Stroebel and Johnston was secured in a manner not technically authorized by law prejudice the appellant. A promise of leniency offered by the state in exchange for testimony is one factor which the jury may consider in weighing

[2] See Note, Judicial Supervision of Non-Statutory Immunity, 65 J. of Criminal Law & Criminology 334 (1974); Note, Judicial Enforcement of Nonstatutory "Immunity Grants": Abrogation by Analogy, 25 Hastings Law J. 435 (1973).

the credibility of a witness. Here, the jury was fully apprised of the means by which the testimony of Stroebel and Johnston was obtained.

In *State v. Johnson* (1969), 77 Wash. 2d 423, 462 P. 2d 933, similar facts were presented. The defendant, Johnson, was on trial for assault with intent to kill. An accomplice, Zaabel, was incarcerated, with two felony charges pending against him. To secure the testimony of Zaabel in the trial of Johnson, the prosecuting attorney promised Zaabel immunity, and, during the course of Johnson's trial, secured a court order dismissing both of Zaabel's pending felony counts.

The Supreme Court of Washington rejected Johnson's contention that Zaabel's testimony was inadmissible. The court stated, at pages 436-37:

"Defendant assigns error to the admission of Zaabel's testimony, contending that the promises of immunity disqualified him as a witness and rendered his testimony incompetent. He argues that, since the prosecuting attorney did not have the power to grant immunity in a case of attempted murder, his acts in doing so were without authority in law and amounted to coercion and bribery and a denial of due process of law.

"The question of the validity of a promise of immunity raised by this assignment of error is not squarely before the court, for it is the defendant and not the witness who is claiming the invalidity of that promise. The question of whether there exists an equitable right to an enforcement of this promise of immunity is not present and would arise only if at some future time the state should attempt to prosecute the witness on either of the two dismissed charges.

"One of the sordid facts of life is that the most

cogent proof of guilt frequently derives from an evil source. Criminals seem to know more about crimes than good people, and the state must get its evidence where it finds it.

"A promise of immunity by the state, therefore, for the purpose of securing the testimony of one who has testimonial knowledge of the crime charged but cannot be compelled against his will to testify is not unknown to the criminal law and does not ipso facto render the testimony incompetent and inadmissible. If the promise is unenforceable but the promisee nevertheless believes or says he believes it was made in good faith—even though both may be without legal power to bind the state to it—making of the promise alone does not render the witness incompetent or preclude his testimony. The promise of immunity goes to the weight of the testimony and may be considered by the jury in determining what effect to give to the testimony of an admitted accomplice. It is the jury and not the court which weighs the evidence and determines to what extent the promise of immunity amounts to a reward or threats and coercion in inducing the promisee witness to waive his constitutional rights against self-incrimination.

"As long as the jury is fully advised of the inducements and the tests to which an accomplice's testimony should be subjected, the actions of the state in attempting to secure the testimony of an accomplice are neither immoral nor unconscionable nor a denial of due process of law. Statutes and appellate decisions which provide for immunity in particular cases and special circumstances and sustain convictions based on the uncorroborated testimony of an accomplice have long since met both the legal and the moral test. * * *"

State v. Crepeault (1976), 126 Vt. 338, 229 A. 2d 245, and *State v. Reed* (1969), 127 Vt. 532, 253 A. 2d 227, are in accord. In *Crepeault*, the Supreme Court of Vermont stated, at pages 339-341:

"It appears in the record that the three participants who testified against the respondent were assured by the State's attorney, in open court, that they would not be prosecuted for their part in the offense. The respondent complains that the prosecutor had no authority to extend immunity to these witnesses and, in doing so, his constitutional rights were invaded. The question was presented during the course of the trial and later renewed by the motion to set aside.

"In oral argument, counsel for the state conceded that, in the absence of a statute to this effect, as prosecuting attorney he had no specific authority to confer immunity on a witness called to testify concerning conduct which might incriminate him. If properly exercised, he did have authority to discontinue or withhold prosecution. See, *in re Tomassi*, 104 Vt. 34, 36, 156 Atl. 533; *In re Garceau*, 125 Vt. 185, 187, 212 A. 2d 633.

"In any event, the assurance affected the credibility of these witnesses rather than their competency. An accomplice who testifies against a confederate in the hope of personal advantage is competent to do so even though the prospect of reward may adversely affect his credibility. *State v. James*, 161 Me. 17, 206 A. 2d 410, 411; *People v. Jones*, 30 Ill. 2d 186, 195 N. E. 2d 698, 699; 23 C. J. S. Criminal Law Section 805; 58 Am. Jur. Witness Section 156.

" * * *

"The respondent further contends that the testimony of the young accomplices was elicited in violation of

their constitutional rights against self-incrimination. The rights of the witnesses in this respect were carefully safeguarded. The fathers of the witnesses were summoned and the trial court saw to it that the boys and their parents had the benefit of the advice of competent counsel before receiving their testimony.

"The right to assert the privilege, or waive it, is personal to the witness. The respondent is in no position to assert the constitutional rights of others. These are matters beyond his control. *Hale v. Henkel*, 201 U.S. 43, 50 L. Ed. 652, 663, 26 S. Ct. 370; *State v. Geddes*, 136 A. 2d 818, 819; *State v. Desilets*, 96 N. H. 245, 73 A. 2d 800, 801; 8 Wigmore, Evidence, Section 2270 (McNaughton Rev. 1961)."

We hold that appellant was not prejudiced by the purported grant of immunity to witnesses Stroebel and Johnston. That grant, although not authorized by law, does not violate any right of the accused, because the privilege against self-incrimination is personal to each witness. A promise of immunity to a witness, when fully disclosed to the jury, affects the weight to be given testimony, not its admissibility.[3]

Appellant's due process and equal protection contentions are equally without merit.

Appellant asserts, in effect, that *any* process of negotiation by which the state induces a witness to testify is coercive, and renders *any* testimony thereby obtained inadmissible. That is not so. The testimony of a witness is not rendered inadmissible merely because he

[3] Though so holding, the court wishes to indicate its disapproval of the prosecutor's decision to fail to advise witnesses Stroebel and Johnston of their constitutional rights under *Miranda v. Arizona* (1966), 384 U. S. 436, for the purpose of granting immunity to, and obtaining the testimony of, those witnesses. The members of the court do not condone this conduct, and prosecutors and their staffs should hereafter avoid such unseemly behavior.

expects or has been promised immunity from prosecution, a lesser penalty, or dismissal of a pending charge. *Caton v. United States* (C. A. 8, 1969), 407 F. 2d 367, 371; *Minkin v. United States* (C. A. 9, 1967), 383 F. 2d 427, 428; *Lyda v. United States* (C. A. 9, 1963), 321 F. 2d 788, 794-795; *United States v. Rainone* (C. A. 2, 1951), 192 F. 2d 860; *State v. Wakinekona* (1972), 53 Hawaii 574, 577, 499 P. 2d 678. See *Lisenba v. California* (1941), 314 U.S. 219, 227. Only when violence, torture or other form of inhumane coercion permeates the process by which testimony is obtained is that testimony inherently untrustworthy, and its admission in violation of due process. Cases cited by the appellant which illustrate this principle are distinguishable upon their facts from this cause.[4]

[4] In *Bradford v. Johnson* (E. D. Mich. 1972), 354 F. Supp. 1331, affirmed (C. A. 6, 1973), 476 F. 2d 66, testimony secured by blatant torture was excluded. A witness, Payne, was questioned by police officers and prosecutors during a period in which he was "denied food, water and sleep, was physically abused and beaten about the face, sides and genitals, was threatened and degraded by racial epithets, and was threatened with the possible arrest of his wife and removal of his children from his home." Payne remained in the custody of the police officers who had tortured and abused him until the date of the trial. After testifying, he was returned to the custody of those officers.

In vacating petitioner Bradford's conviction, the federal district court stated, at page 1338:

"No court would knowingly allow the police or prosecutor to call a person to testify who had no knowledge of the case and encourage him to conjure testimony simply because the state needed a witness. In effect, that is what happened here. Through the use of medieval torture techniques Payne was asked to be the star witness with a reward of cessation of pain and fear upon giving the proper testimony. The real threat of further abuse was not removed. Under these circumstances, the use of knowingly coerced incrimination of another is so patently untrustworthy that it rivals the knowing use of perjured testimony. The petitioner ought, at least, under a system of rebuttable presumption of innocence, to be given the safeguard of uncoerced, untortured incrimination by another."

In *LaFrance v. Bollinger* (D. Mass. 1973), 365 F. Supp. 198, remanded (C. A. 1, 1974), 499 F. 2d 29, also cited by appellant, an evidentiary hearing was ordered, to determine whether a statement made by an accomplice to police officers, later repudiated by the accomplice at trial, was involuntary as the product of suggestions and threats by police at a time when the accomplice was undergoing withdrawal from the use of drugs.

In *People v. Underwood* (1964), 61 Cal. 2d 113, 389 P. 2d 937, a similar statement was excluded because the cammoplice had been interrogated while intoxicated, and had made the statement only after police officers had threatened, cursed, and frightened him.

Cf. *United States v. Wolfe* (C. A. 7, 1962), 307 F. 2d 798; *People v. Portelli* (1965), 15 N. Y. 2d 235, 205 N. E. 2d 857, certiorari denied (1966), 382 U. S. 1009. In *Portelli*, the New York Court of Appeals ruled the testimony of an accomplice admissible, although a pretrial statement consistent with that testimony, given to police officers eight months previously, was the result of overnight custody, a severe beating, and torture. Unlike in *LaFrance* and *Underwood*, no attempt was made in *Portelli* to introduce the pretrail statement in evidence.

[5] No evidence indicates that police officers participated in securing the recording or recordings which incriminated Johnston. Regardless, Johnston's testimony would be admissible. See *Frocunier v. Atchley* (1971), 400 U. S. 446; *Lewis v. United States* (1966), 385 U. S. 206; *Osborn v. United States* (1966), 385 U. S. 323; *Hoffa v. United States* (1966), 385 U. S. 293; *Lopez v. United States* (1963), 373 U. S. 427.

Here, Hal Stroebel, while incarcerated in the Columbus City Prison pending trial on a felony charge, initiated discussions with police officers and the prosecuting attorney concerning a grant of immunity in exchange for testimony. To bolster Stroebel's bid for leniency, his wife, Cindy, secured one or more tape recordings implicating Donald Johnston in criminal activity.[5] At the time those recordings were made, Johnston was not incarcerated. When subsequently arrested, and confronted with the recordings, Johnston accepted an offer of immunity in exchange for testimony. Johnston testified that during the period of incarceration, he felt under "no more [pressure] than normal."

The facts surrounding the plea bargain of Lester Compton are similar. Compton was incarcerated in Columbus pending trial on a felony charge. Upon the

advice of counsel (the appellant), Compton listened to police officers but refused to talk to them. At some point, according to Compton, the appellant asked him to sign a statement to the effect that police officials were attempting to "frame" appellant. Instead, Compton initiated a discussion with the prosecuting attorney concerning a plea bargain. He subsequently pleaded guilty to a lesser included offense.

No evidence in this record suggests that police officers or prosecutors coerced statements or testimony from Stroebel, Johnston, or Compton.

The pretrial statements given to prosecutors and policemen by Stroebel, Johnston, and Compton were examined by the trial court pursuant to Crim. R. 16 (B)(1)(g). No inconsistencies between those statements and the testimony given at appellant's trial were discovered.

We hold that the testimony of Stroebel, Johnston, and Compton was not the product of coercion, and that its introduction in evidence did not violate appellant's right to due process of law.

Finally, appellant asserts that the decision to prosecute him, as opposed to Stroebel, Johnston, and Compton, was without a rational basis, and therefore in violation of the equal protection clause of the federal Constitution.

The discretion vested in a public prosecutor to exercise selectivity in the enforcement of criminal statutes will not be overturned unless that selection is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles* (1962), 368 U.S. 448, 456; *United States v Alarik* (C. A. 8, 1971), 439 F. 2d 1349, 1350-1351; *United States v. Cacco* (C. A. 9, 1970), 428 F. 2d 264,

271; *Newman v. United States* (C. A. D. C., 1967), 382 F. 2d 479. Appellant makes no showing that his selection for prosecution was based upon race, religion, or other suspect or arbitrary classification. Therefore, his claim to a denial of equal protection is without merit.[6]

II.

Appellant assigns as error the admission in evidence of testimony concerning his alleged commission of crimes other than those named in the indictments, and of testimony which suggested that he had "fixed" cases in Franklin County courts. Although no objection to the introduction of this evidence was made at trial, appellant argues that it should be excluded upon appeal pursuant to Crim. R. 52(B).

Prior to the adoption of Crim. R. 52(B), Ohio appellate courts would not consider "any error which counsel for a party complaining of the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Gordon* (1971), 28 Ohio St. 2d 45; *State v. Lancaster* (1971), 25 Ohio St. 2d 83; *State v. Glaros* (1960), 170 Ohio St. 471. "Any other rule," we stated in *State v. Driscoll* (1922), 106 Ohio St. 33, 39, "would relieve counsel from any duty or responsibility to the court and place the entire responsibility upon the trial court to give faultless instructions upon every possible feature of the case, thereby disregarding entirely the true relation of court and counsel which enjoins upon coun-

[6] The record discloses that Stroebel, Johnston, and Compton implicated numerous persons in criminal activity. A Columbus police officer testified that Stroebel and Johnston implicated 40 or 50 different individuals. The prosecuting attorney, in his brief to this court, states that based upon the testimony of Stroebel, Johnston, and Compton, the Franklin County Grand Jury returned indictments against 41 separate individuals, totaling 178 counts.

sel the duty to exercise diligence and to aid the court rather than by silence mislead the court into commission of error."

Crim. R. 52(B), effective July 1, 1973, alters this practice. It specifically provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The rule's purpose is to safeguard the right of a defendant to a fair trial, notwithstanding his failure to object in timely fashion to error at that trial. However, "[t]he plain error rule was intended to be and should be applied to serve rather than subvert the ends of justice. The rule is to be invoked only in exceptional circumstances to avoid a miscarriage of justice." *Eaton v. United States* (C. A. 5, 1968), 398 F. 2d 485, 486.

In this case, the testimony to which error is now assigned was admitted in evidence without objection. We conclude, from the record, that this omission was the result of a deliberate, tactical decision of trial counsel. This fact appellant concedes, at page 28 of his Memorandum in Support of Jurisdiction, filed with this court on December 23, 1974. Appellant and his counsel apparently believed that the admission of the evidence in question would so detract from the credibility of witnesses Stroebel, Johnston, and Compton as to render their entire testimony incapable of belief. Appellant cannot now claim the protection of Crim. R. 52 (B) to negate the effect of this tactical decision.[7]

Two federal cases support this interpretation of Crim. R. 52(B). In *Marshall v. United States* (C. A. 9, 1969), 409 F. 2d 925, the Court of Appeals stated, at page 927:

"While Rule 52(b) may be invoked when the court

[7] Appellant has not alleged, nor would the record support a finding of, incompetence of counsel.

believes that a party should not be unalterably and unfairly prejudiced by inadvertent or ignorant mistakes of his counsel, it is not invoked where, as here, the failure to object may have been deliberate and in furtherance of legitimate trial tactics. In such a case, the concern for orderly administration of justice is paramount and should control except when the integrity of the judicial process itself would otherwise suffer. See *Ladakis v. United States*, 283 F. 2d 141 (10th Cir. 1960)."

In *Ladakis*, the court held, at pages 143-144:

"Counsel for Ladakis assert that the error resulting from the admission of Robinson's testimony was so serious that this court should notice it of its own motion. In criminal cases involving the life or liberty of the accused, the appellate courts of the United States may notice and correct grave errors which seriously affect substantial rights of the accused, although not challenged by objection or motion in the trial court. [Fed. Rules Crim. Proc., Rule 52(b).] We do not regard this as such a case.

"Moreover, ordinarily a court will not notice alleged error of its own motion where, as here, the failure to object in the trial court was not due to inadvertence. Furthermore, in the instant case the action of the trial court upon which the claim of error is predicated was acquiesced in and silently approved by counsel for the complaining party."

We hold that Crim. R. 52(B) may not be invoked to exclude allegedly prejudicial testimony to the admission of which no objection was made at trial as a deliberate tactic of counsel.

III.

Appellant assigns as error a response by the trial judge to a question propounded by the jury during the course of its deliberations. He further asserts that his

conviction upon each of four counts was not supported by the weight of the evidence.

A.

At the close of the first day of its deliberations, the jury submitted two questions in writing to the trial judge. One question stated:

"Does receiving and concealing extend to the point of materially benefitting from the act without physical possession of the merchandise?"

The judge, in writing, responded:

"Not necessarily. To prove the receipt of stolen property it is not necessary to show that it came into the actual or manual possession of the defendant. It is sufficient in that regard to show it came into the custody or control of the defendant so that he could direct the disposal of it. The mere fact, however, that the property was in the possession of the defendant, if such should be the fact, would not alone constitute the receiving of the property. Receiving implies some act on the part of the defendant by which the property came into his possession with his knowledge, consent, and approval."

This response is a correct statement of law. The "prevailing rule at common law and in most jurisdictions is that actual physical possession is not a requisite of receiving. Possession may be constructive." *State v. Bozeyowski* (1962), 77 N. J. Sup. 49, 57, 185 A. 2d 393, certiorari denied (1963), 374 U.S. 851; *Gordon v. State* (1927), 6 Ohio Laws Abs. 87; *United States v. Parent* (C. A. 7, 1973), 484 F. 2d 726; *State v. Martin* (1973), 190 Neb. 212, 206 N. W. 2d 856; *Eliason v. State* (Alaska, 1973), 511 P. 2d 1066; *State v. Hart* (1972), 14 N. C. App. 120, 187 S. E. 2d 351; *United States v. Cousins* (C. A. 9, 1970), 427 F. 2d 382; *State v. Ashby* (1969), 77 Wash. 2d 33, 459 P. 2d 403; *Weddle v. State* (1962), 228 Md. 98, 178 A. 2d 882.

Constructive possession exists when an individual exercises dominion and control over an object, even though that object may not be within his immediate physical possession.

Appellant places great stress upon the first two words employed by the trial court in its response to the jury's question. Those words were neither confusing nor prejudicial. The words "[n]ot necessarily" indicated that while a material benefit alone was insufficient to constitute receipt, physical possession of the property itself was not required. The court's response to the question was proper.

B.

This court is not required to review the weight of evidence in a criminal case. "This court may, however, examine the record with a view of determining whether the proper rules as to the weight of the evidence and degree of proof have been applied." *State v. Martin* (1955), 164 Ohio St. 54, 57.[8] In the syllabus to

[8] Absent a statute which provides otherwise, a criminal conviction in this state may be based solely upon the uncorroborated testimony of an accomplice. *State v. Flonnory* (1972), 31 Ohio St. 2d 124; *Beckman v. State* (1930), 122 Ohio St. 433; *State v. Lehr* (1918), 97 Ohio St. 280; *Allen v. State* (1859), 10 Ohio St. 287. At the time of appellant's trial, statutory proscriptions were contained only in R. C. 2945.60 (treason), R. C. 2945.61 (misprision of treason), R. C. 2945.62 (perjury), and R. C. 2945.63 (seduction of a female). None are relevant to disposition of this cause.

The Ohio rule regarding corroboration of accomplice testimony is in accord with the federal rule, *Caminetti v. United States* (1917), 242 U. S. 470, 495; *United States v. Miceli* (C. A. 1, 1971), 446 F. 2d 256, 258-259; *United States v. Corallo* (C. A. 2, 1969), 413 F. 2d 1306, 1323; *United States v. De Larosa* (C. A. 3, 1971), 450 F. 2d 1057, 1060-1061; *United States v. Miller* (C. A. 4, 1971) 451 F. 2d 1306, 1307; *United States v. Beasley* (C. A. 5, 1975), 519 F. 2d 233, 242; *United States v. Willis* (C. A. 6, 1973), 473 F. 2d 450, 454; *United States v. Adams* (C. A. 7, 1972), 454 F. 2d 1357, 1360; *United States v. Dunn* (C. A. 8, 1974), 494 F. 2d 1280, 1281-1282; *United States v. Sacco* (C. A. 9, 1974), 491 F. 2d 995, 1003-1004; *United States v. Downen* (C. A. 10, 1974), 496 F. 2d 314, 318; *United States v. Lee* (C. A. D. C., 1974), 506 F. 2d 111, 118, and with the rule in 47 of 49 states.

Twenty-nine states do not require corroboration of accomplice

State v. DeHass (1967), 10 Ohio St. 2d 230, we stated:

testimony. *People v. Martinez* (Colo. 1975), 531 P. 2d 964, 965; *State v. LaFountain* (1954), 140 Conn. 613, 616, 620-621, 103 A. 2d 138; *O'Neal v. State* (Del., 1968), 247 A. 2d 207, 210; *Anderson v. State* (Florida, 1970), 241 So. 2d 390, 396; *Scott v. State* (1972), 229 Ga. 541, 545, 192 S. E. 2d 367; Cf. *Famber v. State* (1975), 134 Ga. App. 112, 213 S. E. 2d 525 (Ga. Code Ann. 38 121); *State v. Carvelo* (1961), 45 Hawaii 16, 42, 361 P. 2d 45; *People v. Mentola* (1971), 47 Ill. 2d 579, 583, 268 N E. 2d 8; *Newman v. State* (Ind. 1975), 334 N. E. 2d 684, 687; *State v. Bey* (1975), 217 Kan. 251, 260, 535 P. 2d 881; *State v. Matassa* (1952), 222 La. 363, 379, 62 So. 2d 609; *State v. Smith* (Me. 1973), 312 A. 2d 187, 188; *Commonwealth v. French* (1970), 357 Mass. 356, 396, 259 N. E. 2d 195; *People v. DeLano* (1947), 318 Mich. 557, 567-658, 28 N. W. 2d 909; *Saunders v. State* (Miss. 1975). 313 So. 2d 398, 400; *State v. Lang* (Mo., 1974), 515 S. W. 2d 507, 509; *State v. Oglesby* (1972), 188 Neb. 211, 212, 195 N. W. 2d 754; *State v. Rumney* (1969), 109 N. H. 544, 545, 258 A. 2d 349; *State v. Begyn* (1961) 34 N. J. 35, 54, 167 A. 2d 161; *State v. Maes* (1970), 81 N. M. 550, 554, 469 P. 2d 529; *State v. McNair* (1967), 272 N. C. 130, 132, 157 S. E. 2d 660; *Commonwealth v. Bradley* (1972), 449 Pa. 19, 21-22, 295 A. 2d 842; *State v. Pella* (1966), 101 R. I. 62, 69, 220 A. 2d 226; *State v. Steadman* (1972), 257 S. C. 528, 537-538, 186 S. E. 2d 712; *State v. Crepeault* (1967), 126 Vt. 338, 341-342, 229 A. 2d 245; *Brown v. Commonwealth* (1968), 208 Va. 512, 515, 158 S. E. 2d 663; *State v. Johnson* (1969), 77 Wash. 2d 423, 439, 462 P. 2d 933; *State v. Humphreys* (1945), 128 W. Va. 370, 375-376, 36 S. E. 2d 469; *Kutchera v. State* (1975) 69 Wis. 2d 534, 230 N. W. 2d 750, 758; *Loddy v. State* (Wyoming, 1972), 502 P. 2d 194, 196.

In 17 states, corroboration is required by statute. Ala. Code, Title 15, Section 307; Alaska Stats., Title 12, Section 45.020; Arizona Rev. Stats., Section 13-136; Ark. Stats., Section 43-2116; Idaho Code, Section 19-2117; Iowa Code Anno., Section 782.5; Minn. Stats. Anno., Section 634.04; Mont. Rev. Code Anno., Section 94-7220; McKinney's Consol. Laws of N. Y., Anno., Crim. Proc. Law, Section 60.22; N. D. Cent. Code Anno., Title 29, Section 21-14; Okla. Stats. Anno., Title 22, Section 742; Ore. Rev. Stats., Section 136.440; S. D. Comp. Laws Anno., Title 23, Section 44-10; Vernon's Tex. Stats. Anno., Code Crim. Proc., Art. 38.14; Utah Code Anno. 1953, Title 77, Section 31-18. Cf. West's Anno. Calif. Code, Penal, Section 1111 and Nev. Rev. Stats., Section 175.291, which define an accomplice as "one who is liable to prosecution *for the identical offense* charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Emphasis added.)

In Kentucky, corroboration is required by Crim. R. 9.62, which incorporated the substance of Crime Code Sections 241 and 242.

In Maryland and Tennessee, corroboration is required by judicial decision. See *Watson v. State* (1955), 208 Wd. 210, 217, 117 A. 2d 549; *State v. Fowler* (1963), 213 Tenn. 239, 245-246, 373 S. W. 2d 460.

"1. On the trial of a case, either civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact.

"2. A reviewing court may not reverse a judgment of conviction in a criminal case in a trial court, where the record shows that a verdict of guilty was returned by a jury on sufficient evidence and where no prejudicial error occurred in the actual trial of the case or in the instructions given the jury by the court."

See *Scaccuto v. State* (1928), 118 Ohio St. 397; *Breese v. State* (1861), 12 Ohio St. 146.

Here, appellant's convictions upon two counts of receiving stolen antique glassware, and upon one count of receiving a stolen clock, lamp, table, and music box, are fully supported by the evidence. Probative evidence was directed to each element of those crimes. That evidence, if believed by the jury, was sufficient to establish appellant's guilt beyond a reasonable doubt.

The same is true of appellant's conviction for receiving two Mark 12(A) airplane radios. The record discloses that appellant served as attorney and advisor to one Michael Casurta, who operated a flying school. Stroebel testified that appellant offered to buy airplane radios if Stroebel and Johnston would steal them. Stroebel, Johnston, Casurta, and appellant met at Port Columbus airport, where Casurta showed Johnston how to disconnect and remove radios from airplanes.

Stroebel, Johnston, and Stroebel's wife, Cindy, drove to the Zanesville airport, where they stole the radios. Johnston delivered the radios to Casurta at the flying school, and was paid by Casurta for his services. Stroebel testified that he received nothing for his part in the robbery because he owed appellant attorney fees.

This testimony, if believed by the jury, was sufficient to sustain appellant's conviction. Possession of stolen property may be individual or joint, actual or constructive. Proof of control or dominion is essential.

But control or dominion may be achieved through the instrumentality of another.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE, and W. BROWN, JJ., concur.